

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENDA DIANNE WARE,

Petitioner Below, Appellee,

vs.

Appeal No. 34720

DAVID GARY WARE,

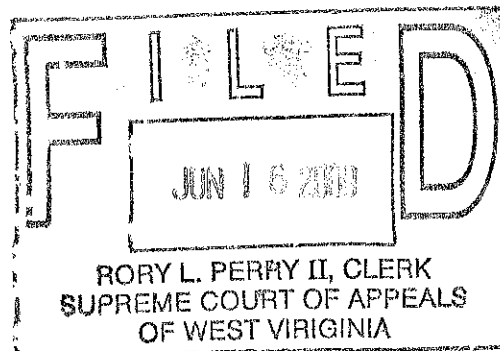
Respondent Below, Appellant

From the Circuit Court of
Harrison County, West Virginia
(Judge James A. Matish)
Circuit Number 05-D-351-4

APPELLANT'S REPLY BRIEF

Counsel for Appellant:

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WVSB# 831



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENDA DIANNE WARE,

Petitioner Below, Appellee

vs.

Appeal No. 34720

DAVID GARY WARE,

Respondent Below, Appellant

From the Circuit Court of
Harrison County, West Virginia
(Judge James A. Matish)
Circuit Number 05-D-351-4

APPELLANT'S REPLY BRIEF

To The Honorable Justices of the
Supreme Court of Appeals of West Virginia

On June 2, 2009, Appellant's counsel received a copy of the "Brief of Appellee and Cross Assignments of Error", to which he files this Reply Brief.

Appellant's Brief accurately states the issues presented on appeal, the procedural history of this case which involved three appeals from Family Court to Circuit Court and two remands from Circuit Court to Family Court, and the facts relevant to said issues. In the Brief of Appellee, she alleges certain "omissions or inaccuracies in Appellant's 'Statement of Facts'" by picking out selective portions of the transcript of the December 16, 2005 hearing which dealt with the subject "Ante-Nuptial Agreement." Since there are in the record before this Court a CD and a transcript of said hearing, a review by this Court of said CD and/or said transcript will provide the best overall assessment of the evidence presented,

including the testimony of the parties and of the witness, Keith Skeen, the attorney who prepared said Agreement. Circuit Court Judge Matish thoroughly reviewed said CD and made specific findings of fact and conclusions of law in regard thereto in the "Order Granting Petition For Appeal And Cross Petition, And Reversing And Remanding Case To Family Court" entered on March 22, 2007.

Appellee also picks out selective portions of the transcript of the December 7, 2007 hearing regarding the testimony of Respondent's expert witness, Mickey Petitto. Since there are in the record before this Court a transcript of said hearing and also a copy of Ms. Petitto's written report, said transcript and said report will provide the best overall assessment of Ms. Petitto's testimony.

As stated in "Appellant's Brief", the facts of this case and the applicable legal authorities cited therein support a finding and conclusion that the subject "Ante-Nuptial Agreement" is valid and enforceable for the same reasons that this Court used in upholding the validity and enforceability of the pre-nuptial agreement in Gant v. Gant, 329 S.E. 2d 106 (W.Va. 1985), all of which is cited and quoted on page 16 of "Appellant's Brief." As further stated in the last paragraph of "Appellant's Brief", in summary, the "Order Granting Petition For Appeal And Cross-Petition And Reversing And Remanding Case To Family Court" entered by the Circuit Court on March 22, 2007 correctly ruled on the validity and enforceability of the subject "Ante-Nuptial Agreement"; and the "Order On Issues Remanded By Circuit Court" entered by the Family Court on July 3, 2007 correctly ruled on the remanded issues and should have been upheld. Copies of these two Orders are attached hereto for the convenience of the Court, as is a copy of the subject "Ante-Nuptial Agreement", which speaks for itself. It is respectfully

submitted that the Circuit Court erred in reversing in part the Family Court's July 3, 2007, "Order On Issues Remanded By Circuit Court," which Order should have been totally upheld, since it specifically followed the findings, conclusions and directives of the Circuit Court's March 22, 2007 first remand Order.

Regarding the Cross-Assignments Of Error, it is respectfully submitted that if Appellee sincerely believed that the Circuit Court committed errors which adversely affected her, she would have timely filed a Petition For Appeal within the requisite time period pursuant to Rule 3(a) of the Rules of Appellate Procedure, and although she may procedurally set forth cross-assignments of error in Appellee's Brief, the validity thereof is seriously suspect and is believed by Appellant to be an effort to divert attention from the issues related to the validity and enforceability of the "Ante-Nuptial Agreement."

The cross-assignments of error regarding the "Ante-Nuptial Agreement" have already been dealt with in Appellant's Brief and reference is made thereto.

The cross-assignment of error regarding the denial of Appellee's request for an award of attorney and expert fees and costs is without merit and was properly ruled upon and denied three times by the Family Court and was properly upheld by the Circuit Court. In paragraph D. on page 4 of the "Order On Issues Remanded By Circuit Court" entered on July 3, 2007, the Family Court properly found and ruled as follows:

"This Court previously ruled in paragraph L. on page 21 of the Decree of Divorce that each party shall pay his or her own attorney fees and costs incurred in the divorce action, and this Court still finds said ruling to be appropriate. Each party has good income and

good income earning ability. This Court awarded the divorce based upon the ground of irreconcilable differences, and, although marital fault was alleged against both parties (adultery against Petitioner and cruelty against Respondent), this Court did not find sufficient proof of any fault ground to grant a divorce thereon. Both parties were awarded substantial assets in equitable distribution, and Respondent has already made an equalizing cash payment to Petitioner in the amount of \$39,581.62, and he has refinanced the marital home loan to remove Petitioner from any liability on their previous marital home loan. Petitioner previously withdrew \$7,000. from the parties' joint bank account, of which amount, she paid her attorney a retainer of \$6,000. Each party incurred substantial attorney fees and expenses and expert witness fees and expenses, and after considering all relevant facts, this Court believes that each party should be responsible for the payment of his and her own respective costs of this litigation."

In paragraph 4 on page 3 of the "Order On Issues Remanded By Circuit Court October 10, 2007", the Family Court properly found and ruled as follows:

"This matter was also remanded for reconsideration by this Court as to Petitioner's request for an award of expert fees and attorney's fees. Given that this Court previously ruled in its **Order on Issues Remanded by Circuit Court** entered July 3, 2007, that Petitioner was entitled to no expert fees or attorney's fees, the Court is not

inclined to change its opinion at this time. Therefore, Petitioner's request for expert's fees and attorney's fees are denied."

The cross-assignment of error regarding the denial of Appellee's request for an award of rehabilitative alimony is without merit and was properly ruled upon and denied three times by the Family Court and was properly upheld by the Circuit Court. In paragraph XIV on pages 3, 4 and 5 of the Decree Of Divorce entered on October 24, 2006, the Family Court provided detailed findings and reasons for denying Appellee's request for an award of rehabilitative alimony, which findings and rulings were correct, were not clearly erroneous, and did not constitute an abuse of said Court's discretion. Appellee was employed prior to and at the time of the final divorce hearing on August 4, 2006, at which time she was working as an x-ray technician at United Hospital Center and also at Medbrook Medical Center. Based upon information and belief, she has remained employed since said date to the present time and is presently employed on a full-time basis at the Veterans Administration Hospital in Clarksburg. Neither party has filed a petition to modify the award of child support set forth in paragraph I on page 19 of the Decree Of Divorce, being the sum of \$1,213.56 per month.

Regarding the "Attorney's Certificate Pursuant To West Virginia Rule of Appellate Procedure 4A(c)" set forth at the end of Appellee's Brief And Cross-Assignments Of Error, Appellant's counsel does not agree with the selective facts alleged by Appellee's counsel based upon her selective memory and her adversarial position as to the testimony of the parties at

the August 4, 2005 hearing, and he states that since there are transcripts of the December 16, 2005 hearing and the December 7, 2007 hearing, and since the Family Court made specific findings of fact in the Decree of Divorce based upon the factual evidence presented at the August 4, 2006 hearing, there is no need for counsel for the parties to assert and dispute her and his recollections of selective portions of testimony from the August 4, 2005 hearing. Further, the record contains numerous exhibits which were introduced into evidence at the August 4, 2006 hearing which were considered by the Family Court. It is questioned whether said Rule 4A(c) even applies, since it applies to the filing of a Petition For Appeal without a transcript of testimony in the lower court, not a Brief filed herein. To the extent that this Court may consider any of the allegations of facts made by Appellee's counsel, a few corrections regarding the testimony and evidence presented during the August 4, 2005 hearing as alleged by Appellee's attorney need to be made, including, but not limited to, the following: (1) the parties did not borrow money from a line of credit on the marital home to pay the balance of the consideration to John Geraffo for his 51% interest in the Pizza Place of Bridgeport, Inc. in 2001, as any line of credit money was used to keep the "Cool Spot" business going, which business subsequently failed, and Appellant was, in the Decree of Divorce, held responsible for the debt of said defunct business in the amount of \$13,497.; (2) Appellant was not abusive to Appellee, did not drink alcohol to excess, and did not threaten to kill Appellee if she left him, all of which is supported by the Family Court's statement that it failed to find sufficient

proof of any fault ground to grant a divorce thereon (paragraph D. on page 4 of "Order On Issues Remanded By Circuit Court" entered on July 3, 2007.

Appellee mistakenly refers to Sections 48-6-101(b) and 48-6-201(a) of the West Virginia Code as statutory authorities relevant to the threshold issue presented in this appeal. An "antenuptial agreement" or "prenuptial agreement" is defined in Section 48-1-203 of said Code as "an agreement between a man and a woman before marriage, but in contemplation and generally in consideration of marriage, by which property rights and interests of the prospective husband and wife, or both of them, are determined, or where property is secured to either or both of them, to their separate estate, or to their children or other persons. An antenuptial agreement may include provisions that define the respective property rights of the parties during the marriage, or upon the death of either or both of the parties. The agreement may provide for the disposition of marital property upon an annulment of the marriage of a divorce or separation of the parties (emphasis supplied)." Section 48-6-101(b) only applies to an antenuptial agreement which affects the property rights of the parties or the disposition of property "after a divorce", not during the marriage or upon a divorce, to which Section 48-1-203 of said Code and the Gant case apply. Section 48-1-237(1) and (3) of said Code defines "separate property" as: "(1) Property acquired by a person before marriage; . . . and (3) Property acquired by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage" As previously

stated, the Pizza Place business located at the Meadowbrook Mall in Bridgeport, Harrison County, West Virginia was specifically excluded from treatment as marital property in paragraph numbered 2 on page 3 of the subject "Ante-Nuptial Agreement." It is further excluded pursuant to the provisions set forth in paragraphs numbered 4 and 6 on page 4 of said "Ante-Nuptial Agreement." As stated by the Family Court in paragraph numbered 4 of the "Order On Issues Remanded By Circuit Court" on July 3, 2007: "In view of the validity of the subject Ante-Nuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Dianne Ayers (now Brenda Dianne Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware's interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest which he subsequently acquired from John Geraffo."

To the extent that Appellant's counsel responds to allegations of facts made by Appellee's counsel in her Brief which are not contained in any transcript, Appellant's counsel certifies that his references to certain testimony adduced at the August 4, 2005 hearing are faithfully represented and are accurately presented to the best of his ability based upon his recollection and his handwritten notes taken during said hearing.

Throughout Appellee's Brief, she erroneously refers to Appellant as "Gary" although she should know that throughout all of these proceedings during the last four years, he has always been referred to as "David" or

"Dave". Said error has no legal effect, but was apparently done to annoy Appellant.

Another error in Appellee's Brief is contained at the top of page 26 thereof wherein it is stated that "Gary attempted to prove adultery (although he did not allege adultery) against Brenda." Appellee should know that on December 23, 2005, Respondent (Appellant) filed an "Amended Answer To Petition For Divorce And Counter-Petition", and in paragraph numbered 9 of his Counter-Petition, he alleged that Petitioner (Appellee) had committed adultery (see page 166 of the Record). Although the Family Court held that adultery was not proven, during the August 4, 2006 hearing, Petitioner (Appellee) admitted having sexual relations with a school custodian named Issac Sloane; Issac Sloane also testified and corroborated said sexual relationship; and a corroborating letter from Appellee to Issac Sloane's wife was also admitted into evidence. Appellee claimed that her sexual relationship with Issac Sloane did not occur until after she had filed for divorce, which is presumably the reason why the Family Court held that adultery had not been proven.

Appellee cites various legal authorities, including California statutory law and case law from other states, which authorities are not relevant to the facts of this or to the law applicable thereto. Based upon the facts of this case, the applicable statutory law and case law (Gant), the specific findings and conclusions of the Circuit Court in its "Order Granting Petition For Appeal And Cross Petition, And Reversing And Remanding Case To Family Court" entered on March 22, 2007, and the

specific findings and conclusions of the Family Court in its "Order On Issues Remanded By Circuit Court" entered on July 3, 2007, those two Orders should be upheld, and the subsequent "Final Order" of the Circuit Court entered on April 9, 2008 should be reversed with a finding by this Court that the subject "Ante-Nuptial Agreement" is valid and enforceable, and by the specific provisions thereof Appellee "waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware's interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest he subsequently acquired from John Geraffo," (as held by the Family Court in paragraph numbered 4 on page 3 of the "Order On Issues Remanded By Circuit Court" entered on July 3, 2007, a copy of which is attached hereto for the convenience of the Court.

Respectfully submitted this 15th day of June, 2009.



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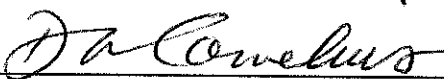
CERTIFICATE OF SERVICE

The undersigned attorney, Douglas A. Cornelius, hereby certifies that on June 15, 2009, service of a true copy of the following document/s: **"APPELLANT'S REPLY BRIEF"** was effected in the following manner:

 X First Class Mail, postage prepaid to: Delby B. Pool
 Certified Mail, return receipt requested
 Hand Delivered to:
 Facsimile Transmission to:
 Other:

Upon the following person/s at the following address/es:

Delby B. Pool
230 Court Street
Clarksburg, WV 26301



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WVSB# 831

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

BRENDA DIANNE WARE,

Petitioner,

vs.

Civil Action No. 05-D-351-4
Judge James A. Matish

DAVID GARY WARE,

Respondent.

**ORDER GRANTING PETITION FOR APPEAL AND CROSS PETITION, AND
REVERSING AND REMANDING CASE TO FAMILY COURT**

Presently pending before the Court is a "Petition for Appeal from Family Court Final Order," filed by Respondent David Gary Ware, on November 22, 2006. Also pending before the Court is a "Response to Petition for Appeal and Cross Petition" filed by Petitioner Brenda Diane Ware on December 4, 2006.

This Court conducted a hearing on the matter on the 4th day of January, 2007. The Petitioner appeared in person and by her counsel, Delby B. Pool, and the Respondent appeared in person and by his counsel, Douglas A. Cornelius. The Court received arguments from both counsel at that time.

After conducting the aforementioned hearing, receiving arguments from both counsel, reviewing said Petition and Response, and conducting a thorough examination of the record, including the video transcript of the Family Court hearings in this matter, and pertinent legal authority, this Court concludes that the "Petition for Appeal" should be **GRANTED**, and the "Cross Petition" should be **GRANTED**, and the Final Order should be affirmed, in part, and reversed, in part, and remanded.

West Virginia Code § 51-2A-14(a) provides that "[t]he circuit court may refuse to consider the petition for appeal, may affirm or reverse the order, may affirm or reverse the order in part or may remand the case with instructions for further hearing before the family court judge." Additionally, "[t]he circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard." W.Va. Code § 51-2A-14(b).

Petitioner and Respondent entered into an Antenuptial Agreement (hereinafter referred to as "Agreement") dated February 11, 1993. The validity of this Agreement has been in dispute since the commencement of this action in July 2005 and continues to be disputed between the parties as of late. Consequently, the Family Court held its first hearing on December 16, 2005, to determine the validity of the Agreement. By Order entered January 31, 2006, Special Family Court Judge Jaymie Godwin Wilfong set aside the Agreement as void and invalid for the following reasons: 1) Attorney Keith Skeen attempted to represent both parties, with Ms. Ware not having an opportunity to consult independent counsel and 2) there was no disclosure of the value of the assets and debts between the parties. A final hearing was then held on August 4, 2006 to resolve the remaining issues between the parties. The Decree of Divorce was entered on October 24, 2006, with incorporation by reference of the January 31, 2006 Order. It is from this Decree which both the Petitioner and Respondent appeal to this Court.

In his Petition, as grounds for appeal, Mr. Ware alleges: 1) the Family Court erred in finding and holding that the parties' Antenuptial Agreement is set aside as void and invalid and 2) the Family Court erred in finding that the marital value of the Pizza Place of Bridgeport is \$322,200.00 and that Brenda Diane Ware is entitled to 50% thereof.

In her Cross Petition, as grounds for appeal, Ms. Ware alleges: 1) the Family Court erred because it was without statutory authority to permanently bar her request from alimony in the future, 2) the Family Court erred by improperly declining to award any credit for payments made on the debt of a 1992 Chevrolet truck that Mr. Ware owned at the inception of the marriage and which was paid off during the marriage, 3) the Family Court erred in denying Ms. Ware's request for expert fees, and 4) the Family Court erred in denying Ms. Ware's request for attorney fees.

The Court finds that the Family Court Judge abused her discretion in ruling as a matter of law that the Antenuptial Agreement in this case is invalid due to Mr. Skeen's representation of both parties. The Court further finds that the Family Court Judge's finding that Ms. Ware was denied an opportunity to consult with independent counsel is clearly erroneous. As a general rule, when examining the validity of prenuptial agreements, the Supreme Court of Appeals of West Virginia has held,

"[p]renuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid in West Virginia; the burden of proving the invalidity of such an agreement is upon the person would have the agreement held invalid."

Syl. Pt. 1, Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985).

The Court further held in Syl. Pt. 2, Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985),

"[t]he validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstance free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress, or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent

advice of counsel is *not a prerequisite to enforceability* when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the *opportunity* to consult with independent counsel." (emphasis added)

The Court notes that while either or both parties may have a malpractice action against an attorney in this situation, it in no way rises to the level of voiding an agreement that was freely and voluntarily executed by the parties, without a finding of duress or coercion¹. It was the undisputed testimony of the parties, as well as Mr. Skeen, at the hearing held on December 16, 2005, that Mr. Skeen was acquainted with both parties only through their employment at establishments located in the Meadowbrook Mall. Although Mr. Skeen testified that David Ware initially contacted him about preparing the Agreement, Mr. Ware and Mr. Skeen both testified that the two of them never met privately prior to their meeting, along with Ms. Ware, to review the Agreement on February 10, 1993. It is also undisputed that at the initial meeting, Brenda Ware objected to a provision in the Agreement which provided for a mutual waiver of alimony. The Agreement was then re-drafted by Mr. Skeen and signed by the parties the next day, February 11, 1993, in Mr. Skeen's office.

The Court notes that there have been no allegations presented that Ms. Ware made a request, at any time, to consult with another attorney and was told she could not do so. In fact, the Court feels that Ms. Ware's voiced objection to the provision addressing the waiver of alimony is indicative of her "knowledge of its content and legal effect," as set forth in Gant, *supra*. Moreover, the Court feels that the terms of the agreement were

¹The Court notes that the Family Court, in its January 31, 2006 Order, found that the evidence presented on the issue of duress was conflicting.

understandable and that Ms. Ware was a reasonably intelligent adult at the time she signed the Agreement. She testified that she was 22 years of age, could read and write, and was a high school graduate as well as a graduate of a two year program in x-ray technology. Additionally, Mr. Ware testified at the hearing held on December 16, 2005 that he and Ms. Ware had discussions about entering a prenuptial agreement for approximately two months prior to the execution of the antenuptial Agreement in this case.

Furthermore, attached to the Antenuptial Agreement are two certifications signed by Mr. Skeen and *both* of the parties which set forth Mr. Skeen's full advisement of *both* parties of their property rights, their respective acknowledgments of a full and complete understanding of the terms and provisions contained therein, and their voluntary execution of the Agreement in his presence. These certifications are identical and are signed by *both* of the parties.

In reaching its holding, the Court in Gant reasoned that general contract law governs prenuptial agreements and that it is clear that there is no requirement in general contract law that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable. Id. at 745. The Court finds that under West Virginia law all that is required is the *opportunity* to consult with independent counsel and that Ms. Ware had that opportunity and for whatever reason chose not to utilize it. Therefore, the Court finds that the Family Court erred in ruling that the Antenuptial Agreement in this case is invalid because one attorney represented both parties and Ms. Ware had no opportunity to consult with independent counsel.

The Court also finds that the Family Court Judge abused her discretion in finding, as a matter of law, that the Antenuptial Agreement in this case is invalid due to the lack of financial disclosure between the parties at the time of the execution of the Agreement. "For a prenuptial agreement to be enforceable, it is not necessary that before the agreement was executed the parties meticulously disclosed to one another every detail of their financial affairs: it is sufficient if the party against whom the agreement is to be enforced had a general idea of the other party's financial condition and that there was no fraud or concealment that had the effect of inducing the party to be charged into entering an agreement that otherwise would not have been made. Syl. Pt. 2, Pajak v. Pajak, 182 W.Va. 28, 385 S.E. 2d 384 (1989).

Although Ms. Ware maintains she was unaware of all of Mr. Ware's assets at the time she entered into the Agreement, the Court finds that she had a general idea of Mr. Ware's financial condition. The parties had lived together for approximately 1 ½ years prior to the signing and had been paying bills jointly during that time period. More importantly, Ms. Ware knew that Mr. Ware's major asset was his interest in a business known as the Pizza Place of Bridgeport and that the only reason for the Antenuptial Agreement was to protect Mr. Ware's interest in that very business. There is no evidence that Mr. Ware concealed his assets from Ms. Ware or that he otherwise misled her as to what those assets were.

In Pajak, the Court held that the wife had sufficient knowledge of the husband's assets to validate an antenuptial agreement under which she waived any and all interests in his estate and which recited that it was entered into by each party with full knowledge as to the extent and probable value of the estate of the other. This exact language was

used in the instant Agreement in paragraph 8, page 6 wherein it states, "[i]t is AGREED that this agreement is entered into by each party with the full knowledge on the part of each as to the extent and probable value of the estate of the other." Therefore, the Court feels Ms. Ware had sufficient knowledge of Mr. Ware's assets and that the Family Court erred when it invalidated the Antenuptial Agreement based upon nondisclosure of assets.

Mr. Ware's second ground for appeal is that the Family Court erred in finding the marital value of the Pizza Place of Bridgeport to be \$322,200.00 and that Brenda Diane Ware is entitled to 50% thereof. Although Mr. Ware asserts in his Petition for Appeal and subsequent submissions to the Court that this ground shall be rendered moot upon the Court's finding that the Antenuptial Agreement is valid, the Court disagrees. In light of the Court's ruling above that the Antenuptial Agreement is valid, the Court remands this issue to the Family Court so that it may make a determination, upon examining the language employed in the Antenuptial Agreement², as to the disposition of the assets addressed in the Agreement. This includes whether or not the 51% interest in the Pizza Place of Bridgeport, which was acquired during the marriage by Mr. Ware, is protected under the Agreement and whether or not Ms. Ware is entitled to any increase that may have occurred during the marriage in the 49% interest that Mr. Ware owned in the business prior to the marriage.

The Court will next address the grounds alleged by Petitioner in the Cross Petition. First, Petitioner alleges that the Family Court is without statutory authority to permanently bar her from requesting alimony in the future. However, counsel for Petitioner provides no

² More specifically, the Court directs Judge Wilfong's attention to paragraph no. 2 on page 3, as well as paragraph nos. 4 and 6 on page 4.

legal authority in support of this argument. In the Divorce Decree entered October 24, 2006, Judge Wilfong clearly identified the distribution of the marital property as a factor in considering the claim to spousal support in this case.³ Because the Court feels that its ruling regarding the validity of the Antenuptial Agreement could have a significant influence on Judge Wilfong's ruling on this issue, the Court remands this issue for further consideration by the Family Court.⁴

Second, Petitioner alleges that the Family Court erred in its denial of her request for credit for payments made on a 1992 Chevrolet truck owned by the Respondent. Petitioner argues that she should be given credit for the payments she made toward a total balance of \$12,468.24 during the marriage to extinguish the debt on said truck. The Family Court declined to award Ms. Ware any such credit, finding that both parties made payments on the truck and both parties also received a benefit from the use of the truck. Pursuant to W.Va. Code §48-1-233(2)(A), marital property includes the *amount of any increase in value in the separate property* of either of the parties to a marriage, which increase results from an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property... (emphasis added). In order to determine whether or not Ms. Ware is entitled to a credit for her payments made on the truck, evidence would need to be provided by her as to the value of the truck at the time of the

³The Divorce Decree states, in Paragraph XIV, page 4, "[t]he distribution of marital property does affect the claim to spousal support because each of the parties will receive substantial assets, or the equivalent by monetary payment of equitable distribution."

⁴Because Judge Wilfong permanently barred Ms. Ware from requesting alimony in the future, the Court feels that Judge Wilfong must then address the interplay between W.Va. Code §§ 48-5-701, 48-6-201(b), and 48-8-101-105, and whether or not the request for rehabilitative alimony is permanently barred even where no award is made at the time of divorce.

marriage as well as its value at the time of divorce. However, this information was not provided by Ms. Ware below. Nevertheless, the Court remands this issue for further consideration by the Family Court in light of its forthcoming interpretation of the Antenuptial Agreement and the provisions contained therein.

As her third and fourth grounds for appeal, Petitioner alleges that the Family Court erred in its denial of her request for expert fees and attorney fees, respectively. The Court feels that the Family Court's decision on this issue may also be impacted by the ruling above on the validity of the Antenuptial Agreement and by the final equitable distribution award, if any. Therefore, the Court remands this issue to the Family Court for further consideration.

Accordingly, based upon all of the foregoing, it is ORDERED that the Petition for Appeal should be and the same is hereby GRANTED and the Divorce Decree should be and the same is hereby AFFIRMED, in part, as to the granting of the divorce, REVERSED, in part, and REMANDED to the Family Court for interpretation of the Antenuptial Agreement and the provisions set forth by the Court for consideration and for further consideration on the issues concerning any equitable distribution award, alimony award, award of expert fees and award of attorney fees.

It is further ORDERED, pursuant to Rule 35 of the WV Rules of Practice and Procedure for Family Court, that the Special Family Court Judge hold said hearing within 30 days of the entry of this Order.

It is further ORDERED that the Clerk of this Court shall send a certified copy of this ORDER to:

Delby B. Pool, Esquire
230 Court Street
Clarksburg, WV 26301

Douglas A. Cornelius, Esquire
PO Box 4424
Clarksburg, WV 26302-4424

The Hon. Jaymie Godwin Willfong, Special Family Court Judge
Family Court of Harrison County
Randolph County Courthouse
7 Randolph Avenue
Elkins, WV 26241

ENTER: 03/22/2007


James A. Matish, Chief Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 22 day of MARCH, 2007.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 26 day of MARCH, 2007.

Donald L. Kopp, II PA
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

IN THE FAMILY COURT OF HARRISON COUNTY, WEST VIRGINIA

In Re The Marriage Of:

BRENDA DIANNE WARE,

Petitioner,

and

DAVID GARY WARE,

Civil Action No. 05-D-351-4

Respondent.

ORDER ON ISSUES REMANDED BY CIRCUIT COURT

On March 22, 2007, the Circuit Court of Harrison County, (Chief Judge James A. Matish) entered an "Order Granting Petition For Appeal And Cross Petition, And Reversing And Remanding Case To Family Court." On April 18, 2007, this Court (Special Family Court Judge Jaymie Godwin Wilfong) conducted a hearing during which the parties' counsel presented arguments regarding the issues remanded to this Court.

Based upon the evidence presented at the December 16, 2005 hearing regarding the Ante-Nuptial Agreement, the evidence presented at the August 4, 2006 final divorce hearing, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law regarding the issues remanded to it.:

A. Regarding the Pizza Place of Bridgeport and the affect of the Ante-Nuptial Agreement thereon:

1. This Court is bound by and accepts the finding and conclusion of the Harrison County Circuit Court (Judge Matish) that the subject Ante-Nuptial Agreement is valid and is enforceable for the reasons stated in the subject Order reversing and remanding this case.

2. The specific language of said Ante-Nuptial Agreement supports a finding and conclusion that Petitioner Brenda Dianne Ware (formerly Brenda Dianne Ayers) waived, released and relinquished any and all rights which she could or might have, by reason of marriage, in and to the Pizza Place of Bridgeport business located at the Meadowbrook Mall in Bridgeport, West Virginia. This Court in paragraph 4 on page 2 of its "Order Regarding Antenuptial Agreement", specifically found that although paragraph 2 of said Ante-Nuptial Agreement used the word "franchise" and that there was no "franchise", "the parties were aware of what was the subject matter in that paragraph." On sheet 20, page 77 of the transcript of the December 16, 2005 hearing, this Court stated: "In fact, there was no franchise. But the Court finds that there was a meeting of the minds. Everybody knew what the parties were talking about." Judge Matish also specifically found in the second paragraph on page 6 of his Order that "Ms. Ware knew that Mr. Ware's major asset was his interest in a business known as the Pizza Place of Bridgeport and that the only reason for the Antenuptial Agreement was to protect Mr. Ware's interest in that very business."

3. In addition to directing this Court to the specific language contained in paragraph 2 on page 3 of the subject Ante-Nuptial Agreement, Judge Matish further directed this Court's attention to paragraph numbers 4 and 6 on page 4 thereof. Paragraph number 4 clearly and specifically provides that each party "shall respectively own all personal property which each respectively now owns or may hereafter acquire free from any claim on the part of the other spouse . . . (emphasis supplied)". Paragraph number 6 clearly and specifically provides that each party releases "all rights, which, by reason of their marriage, each may acquire in the property or estate of the other."

4. In view of the validity of the subject Ante-Nuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Dianne Ayers (now Brenda Dianne Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware's interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest he subsequently acquired from John Geraffo.

B. Regarding the 1992 Chevrolet truck and the loan payments made thereon during the marriage:

Petitioner had the burden of proving that the value of Mr. Ware's pre-marital truck increased during the marriage by either expending marital funds to pay down debt against it or by performing work on it during the marriage and by proving the amount of any increase in value. It is generally true that motor vehicles depreciate in value as fast or faster than a motor vehicle loan thereon is paid off. Petitioner failed to introduce any evidence at the final hearing which could support a finding that the value of said truck increased during the parties' marriage. No evidence was introduced by her as to the value of said truck or as to the principal debt due on said truck loan as of the date of the parties' marriage (February 20, 1993) or as of the date of the parties' separation (August 25, 2005). Further, no evidence was introduced by her that any marital funds were used to restore said truck to its original condition or to otherwise increase its ever depreciating value during the 12-1/2 year period from date of marriage to date of separation.

C. Regarding the Petitioner's rehabilitative spousal support request:

At the final hearing, Petitioner requested rehabilitative spousal support in the amount of \$1,200. per month for three years. In addition to this Court's reasons for denying said request as set forth in paragraph XIV on pages 3, 4 and 5 of the Decree Of Divorce, an award of

rehabilitative spousal support is not merited in view of the specific language of Section 48-8-105(a) of the West Virginia Code, which states: "The Court may award rehabilitative spousal support for a limited period of time to allow the recipient spouse, through reasonable efforts, to become gainfully employed (emphasis supplied)." At the time of the final hearing, Petitioner was already gainfully employed with a gross monthly income of \$3,100. per month. In addition to her already being gainfully employed, Petitioner failed to provide any specific testimony as to the actual cost of any training or as to the length of any training.

D. Regarding Petitioner's request for an award of attorney fees and expert witness fees:

This Court previously ruled in paragraph L. on page 21 of the Decree of Divorce that each party shall pay his or her own attorney fees and costs incurred in the divorce action, and this Court still finds said ruling to be appropriate. Each party has good income and good income earning ability. This Court awarded the divorce based upon the ground of irreconcilable differences, and, although marital fault was alleged against both parties (adultery against Petitioner and cruelty against Respondent), this Court did not find sufficient proof of any fault ground to grant a divorce thereon. Both parties were awarded substantial assets in equitable distribution, and Respondent has already made an equalizing cash payment to Petitioner in the amount of \$39,581.62, and he has refinanced the marital home loan to remove Petitioner from any liability on their previous marital home loan. Petitioner previously withdrew \$7,000. from the parties' joint bank account, of which amount, she paid her attorney a retainer of \$6,000. Each party incurred substantial attorney fees and expenses and expert witness fees and expenses, and after considering all relevant facts, this Court believes that each party should be responsible for the payment of his and her own respective costs of this litigation.

WHEREFORE, it is ORDERED as follows:

1. Based upon the findings and conclusions contained in paragraph A. on pages 1-3 hereof, Petitioner is not entitled to any of the value of the Pizza Place Of Bridgeport business entity, and her request for a portion of said value is denied.
2. Based upon the findings and conclusions contained in paragraph B. on page 3 hereof, Petitioner is not entitled to any credit for the truck loan payments made on Respondent's pre-marital 1992 truck during the parties' marriage to separation time period, and her request for a portion of an alleged increased value thereof during said time period is denied.
3. Based upon the findings and conclusions contained in paragraph C. on pages 3-4 hereof, Petitioner's request for rehabilitative spousal support is denied.
4. Based upon the findings and conclusions contained in paragraph D. on page 4 hereof, Petitioner's request for an award of attorney fees and expenses and expert witness fees and expenses is denied.
5. Pursuant to Rule 22 (c) of the Rules Of Practice And Procedure For Family Court, the parties are hereby informed as follows:
 - (1) This is a final Order;
 - (2) Any party aggrieved by this final Order may take an appeal either to the Circuit Court of this County or directly to the Supreme Court Of Appeals of West Virginia;
 - (3) A Petition For Appeal to the Circuit Court may be filed by either party within thirty days after the entry of this final Order; and
 - (4) In order to appeal directly to the Supreme Court Of Appeals, both parties must file, within fourteen days after the entry of this final Order, a joint notice of their intent to appeal directly to the Supreme Court and a waiver of their right to appeal to the Circuit Court.

6. The Clerk shall mail certified copies hereof to : Douglas A. Cornelius, P.O. Box 4424, Clarksburg, WV 26302-4424; and Delby B. Pool, 230 Court Street, Clarksburg, WV 26301.

Enter

July 3, 2007

[Signature]
Judge

Prepared and Submitted By:

[Signature: D. A. Cornelius]

Douglas A. Cornelius
Counsel for Respondent
P.O. Box 4424
Clarksburg, WV 26302-4424
304-622-3100
WVSB #831

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action

on the 3 day of July, 2007.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 9 day of July, 2007.

Donald L. Kopp, II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

ANTE-NUPTIAL AGREEMENT

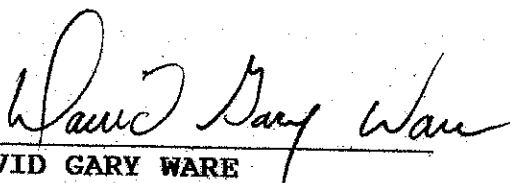
THIS ANTE-NUPTIAL AGREEMENT, made and entered into, in duplicate original, this the 11TH day of February, 1993, by and between DAVID GARY WARE, party of the first part, and BRENDA DIANNE AYERS, party of the second part, both of Clarksburg, Harrison County, West Virginia.

WHEREAS, the said DAVID GARY WARE and BRENDA DIANNE AYERS intend to be married within the near future; and

WHEREAS, DAVID GARY WARE and BRENDA DIANNE AYERS have disclosed each unto the other the nature and extent of their various property interests and of their sources of income; and

WHEREAS, DAVID GARY WARE and BRENDA DIANNE AYERS desire the release of, after the solemnization of their marriage, all rights that either DAVID GARY WARE or BRENDA DIANNE AYERS might or could have, by reason of the marriage, in the property of the other which either now has or may hereafter acquire, in the respective estate of either upon his or her death; and

WHEREAS, the parties acknowledge that nothing herein contained shall prevent the parties from creating and terminating, from time to time, as they may deem appropriate, joint ownership in real estate with the right of survivorship; and


DAVID GARY WARE


BRENDA DIANNE AYERS

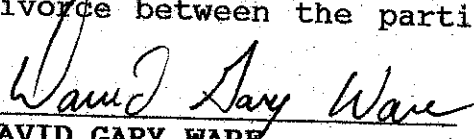
WHEREAS, DAVID GARY WARE desires to accept this provision in lieu of all rights which he would otherwise acquire by reason of the marriage in the property or the estate of BRENDA DIANNE AYERS; and

WHEREAS, BRENDA DIANNE AYERS desires to accept this provision in lieu of all rights which she would otherwise acquire by reason of the marriage in the property or estate of DAVID GARY WARE; and

WHEREAS, the purpose of this Agreement is to promote marital harmony, in that the parties hereto desire a marriage which would extend for the period of their just lives and each is desirous of relinquishing any monetary benefits that might be obtained by institution of legal proceedings for dissolution of the marriage.

NOW, THEREFORE, in consideration of said marriage, and of the mutual covenants between said parties herein contained and the sum of One Dollar (\$1.00), each to the other paid, the receipt of which is hereby acknowledged, the parties do hereby agree as follows:

1. Real Estate: (a) With respect to that certain real estate located at Grass Run Road, Bristol, Harrison County, West Virginia, now owned jointly by the parties, in the event of a divorce between the parties hereto, said residence shall become

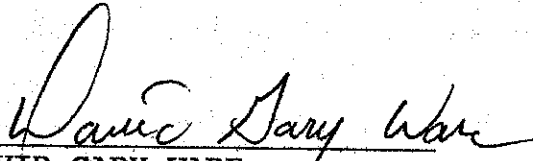

DAVID GARY WARE


BRENDA DIANNE AYERS

marital property, including any increases in value, whether active or passive.

2. Business. The Pizza Place franchise located at the Meadowbrook Mall, Bridgeport, Harrison County, West Virginia, owned by DAVID GARY WARE and John Geraffo as co-owners will remain the property of DAVID GARY WARE. BRENDA DIANNE AYERS releases all rights that she could or might have, by reason of marriage, in the Pizza Place franchise located at Meadowbrook Mall, Bridgeport, Harrison County, West Virginia as well as any future acquisitions of Pizza Place franchises.

3. Except as provided herein, DAVID GARY WARE and BRENDA DIANNE AYERS shall hold all real property which each respectfully now owns or may hereafter acquire free from any claim of dower or curtsy, inchoate or otherwise, on the part of each respective spouse, and this Agreement shall evidence the right of each said party to convey any of his or her real estate free from any such claim of dower or curtsy. Each, at the request of the other, shall execute, acknowledge, and deliver such other instruments as may be reasonably requires to accomplish the transfer by DAVID GARY WARE or BRENDA DIANNE AYERS of any of his or her real property free from and such claim of dower or curtsy or to divest any claim of dower or curtsy in such respective property.


DAVID GARY WARE


BRENDA DIANNE AYERS

4. Release of Other Rights: DAVID GARY WARE and BRENDA DIANNE AYERS shall respectively own all personal property which each respectively now owns or may hereafter acquire free from any claim on the part of the other spouse and this Agreement shall evidence the right of each spouse hereto to transfer, assign and set over any of his or her personal property free from any such claim by the other spouse. Each spouse, at the request of the other, shall execute, acknowledge and deliver such instruments as may be reasonably required to accomplish the transfer by the other of any of his or her personal property free from any such claim.

5. Consideration: The mutual exchange of promises, one to the other, by DAVID GARY WARE and BRENDA DIANNE AYERS releasing each party's respective rights in real and personal property of the other, the love and affection of the intended marriage, and the sum of One Dollar (\$1.00) is to be the full and adequate consideration for this Agreement.

6. Release of Marital Rights: DAVID GARY WARE and BRENDA DIANNE AYERS and each of them shall accept the consideration hereinabove provided for in release of and in full satisfaction of all rights, which, by reason of their marriage, each may acquire in the property or estate of the other, and in consideration thereof, each does hereby waive and relinquish all rights which, as surviving spouse, said party would otherwise acquire in the


DAVID GARY WARE


BRENDA DIANNE AYERS

property or estate, under the law now or hereinafter in effect in any jurisdiction, whether by way of dower, curtsy, distributive share, right of election to take against a Will, widow's or widower's allowance, or otherwise.

7. Obligations: (a) All debts or obligations currently in the exclusive name of DAVID GARY WARE shall be and remain the separate and distinct obligation of DAVID GARY WARE and the said DAVID GARY WARE shall save the said BRENDA DIANNE AYERS harmless from the repayment of any of said debts or obligations.

(b) All debts or obligations currently in the exclusive name of BRENDA DIANNE AYERS shall be and remain the separate and distinct obligation of BRENDA DIANNE AYERS and the said BRENDA DIANNE AYERS shall save the said DAVID GARY WARE harmless from the repayment of any of said debts or obligations.

(c) All future debts or obligations contracted exclusively in the name of DAVID GARY WARE shall be and remain the separate and distinct obligation of the said DAVID GARY WARE and the said DAVID GARY WARE shall save the said BRENDA DIANNE AYERS harmless from the repayment of any and all said future debts or obligations.

(d) All future debts or obligations contracted exclusively in the name of BRENDA DIANNE AYERS shall be and remain the separate and distinct obligation of the said BRENDA DIANNE


DAVID GARY WARE



BRENDA DIANNE AYERS

AYERS and the said BRENDA DIANNE AYERS shall save the said DAVID GARY WARE harmless from the repayment of any and all said future debts or obligations.

8. Disclosure of Facts: It is AGREED that this agreement is entered into by each party with the full knowledge on the part of each as to the extent and probable value of the estate of the other and of all the rights conferred by law upon each in the estate of the other by virtue of said proposed marriage. It is their desire, intent, and they hereby agree, in consideration of their marriage, that their respective rights in and to each other's estate as determined and fixed by this agreement, and shall, in lieu thereof, be determined and fixed by this agreement, and shall be, and is, binding upon them and their respective legal heirs, successors, and assigns.

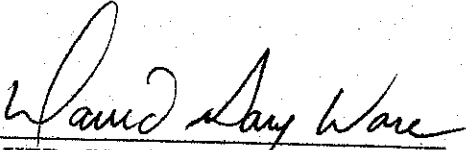
9. Effective Date: This Agreement shall come into effect only if the contemplated marriage between DAVID GARY WARE and BRENDA DIANNE AYERS is solemnized and, upon coming into effect, shall bind and inure to the benefit of the parties and their respective heirs, devisees, personal representatives and assigns, and shall only be modifiable in writing.

10. This Agreement shall be construed and interpreted under the applicable laws and decisions of the State of West Virginia.


DAVID GARY WARE


BRENDA DIANNE AYERS

11. Should any provision of this Agreement be found to be illegal and in conflict with any applicable law, the validity of the remaining portion shall not be affected thereby and shall remain in full force and effect.


DAVID GARY WARE


BRENDA DIANNE AYERS

WITNESS the following signatures and seals:

David Gary Ware (SEAL)
DAVID GARY WARE

Brenda Dianne Ayers (SEAL)
BRENDA DIANNE AYERS

David Gary Ware
DAVID GARY WARE

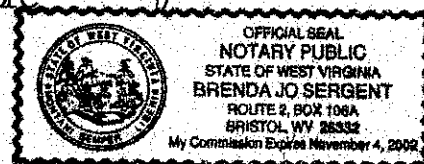
Brenda Dianne Ayers
BRENDA DIANNE AYERS

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:

^{by}
11 day of February, 1993, by DAVID GARY WARE.

My commission expires: 11-04-02.

Brenda Jo Sargent
Notary Public

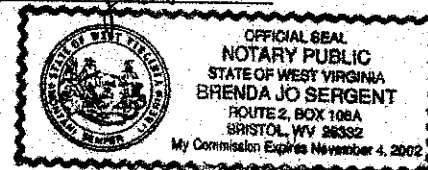


STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:

^{by}
11 day of February, 1993, by BRENDA DIANNE AYERS.

My commission expires: 11-04-02.

Brenda Jo Sargent
Notary Public



This instrument prepared by KEITH SKEEN,
Attorney at Law
Suite 211, Goff Building
Clarksburg, W.Va. 26301
304-624-7832

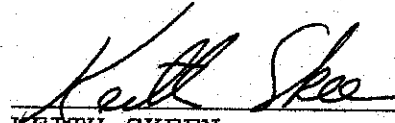
David Gary Ware
DAVID GARY WARE

Brenda Dianne Ayers
BRENDA DIANNE AYERS

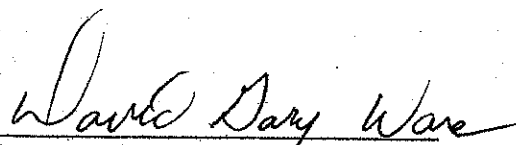
CERTIFICATION OF ATTORNEY

I, Keith Skeen, certify that I am a duly licensed attorney, admitted to practice in the State of West Virginia; that I have consulted with DAVID GARY WARE, a party to the foregoing instrument, and that I have fully advised him of his property rights and of the legal significance of the foregoing Agreement; that he has acknowledged a full and complete understanding of the legal consequences of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed the Agreement in my presence.

Dated this 11TH day of FEBRUARY, 1993.



KEITH SKEEN



DAVID GARY WARE



BRENDA DIANNE AYERS

CERTIFICATION OF ATTORNEY

I, KEITH SKEEN, certify that I am a duly licensed attorney, admitted to practice in the State of West Virginia; that I have consulted with BRENDA DIANNE AYERS, a party to the foregoing instrument, and that I have fully advised her of her property rights and of the legal significance of the foregoing Agreement; that she has acknowledged a full and complete understanding of the legal consequences of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed the Agreement in my presence.

Dated this 11TH day of FEBRUARY, 1993.

Keith Skeen

David Gary Ware
DAVID GARY WARE

Brenda Dianne Ayers
BRENDA DIANNE AYERS